

# ***SECTION P***

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## **I. COMBAT OPERATIONS FUNDING**

### **1. CONSTRUCTION**

- a. Title 10, United States Code, Chapter 169 (10 U.S.C. 2801 thru 2865), Military Construction and Military Family Housing.
- b. Title 10, United States Code, Chapter 1, (10 U.S.C. 101), Definitions, Section 101(47), Contingency Operation.

Operations funds are the appropriate funding source to acquire materials and/or cost of erection of structures which are clearly of **atemporary operational nature** and intended to be used for only **atemporary period** by operational forces as required to facilitate combat operations, and which will not be used to sustain permanent or contingency operations at the conclusion of the combat.

MILCON criteria apply in all other situations, including construction for which the United States would have a follow-on or contingency use after the termination of the military operations necessitating the construction.

### **2. WEAPONS**

Department of Defense Appropriation Act, 1995, Title III.

Operations funds are the appropriate funding source to acquire weapons from indigenous or opposing forces rather than the Procurement of Weapons and Tracked Combat Vehicles, Army appropriation.

### **3. HUMANITARIAN ASSISTANCE**

National Defense Authorization Act for Fiscal Year 1993, Section 304 amended subchapter II of chapter 152 of Title 10, United States Code, by adding 10 U.S.C. § 2551, which provides, in part, that "To the extent provided in defense authorization Acts, funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other

humanitarian purposes worldwide."

## **II. DISASTER OPERATIONS FUNDING**

### **1. Emergency Response Fund, Defense (DERF)**

Department of Defense Appropriations Act, 1990, Title V

For the "Emergency Response Fund, Defense" \$100,000,000, to remain available until expended. The Fund shall be available for providing reimbursement to currently applicable appropriations of the Department of Defense for supplies and services provided in anticipation of requests from other Federal Departments and agencies and from State and local governments for assistance on a reimbursable basis to respond to natural or manmade disasters. The Fund may be used upon a determination by the Secretary of Defense that immediate action is necessary before a formal request for assistance on a reimbursable basis is received. There shall be deposited to the Fund: (a) reimbursements received by the Department of Defense for the supplies and services provided by the Department in its response efforts and (b) appropriations made to the Department of Defense for the Fund. Reimbursements and appropriations deposited to the Fund shall remain available until expended.

### **2. STAFFORD DISASTER RELIEF AND EMERGENCY ASSISTANCE ACT**

a. Public Law 93-288, 42 U.S.C. 5121, et seq.

#### **b. THE FEDERAL RESPONSE PLAN (FRP)**

The FRP is a Memorandum of Understanding between FEMA and other Federal agencies which provide domestic disaster assistance, including DoD. The FRP implements the FEMA Director's authority under E.O. 12148 to "establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies."

#### **c. 12 EMERGENCY SUPPORT FUNCTIONS (ESF)**

ESF 3 - Public Works  
ESF 9 - Urban Search and Rescue

#### **d. DOD IMPLEMENTING REGULATIONS**

DoD 3025.1 Use of Military Resources During Peacetime Civil Emergencies within the United States, its Territories, and Possessions, May 23, 1980.

AR 500-60, Disaster Relief, 1 August 1981.

e. **REIMBURSEMENT**

44 CFR § 206.8

FRP, Financial Management Annex (FM-1)

FEMA mission assignment, taskings, letters

Fund cites are contained in FEMA tasking letters

3. **Temporary Tours of Active Duty versus Active Duty for Special Work (TTAD-ADSW)**

- a. Title I of the 1995 DoD Appropriations Act provides that the RPA appropriation may be used:

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army Reserve . . . while serving on active duty under section 672(d) of Title 10, United States Code, in connection with performing duty specified in section 678(a) of Title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty or other duty . . . . (1995 DoD Appropriations Act, Pub. L. 103-335, 108 Stat. 2601 (1994)) (emphasis added)).

- b. As set forth in Title I of the 1995 DoD Appropriations Act, the NGPA appropriation may be used:

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army National Guard . . . while serving on duty under section 672(d) of Title 10, United States Code or section 502(f) of Title 32, United States Code in connection with performing duty specified in section 678(a) of Title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty . . . . (1995 DoD Appropriations Act, Pub. L. 103-335, 108 Stat. 2601 (1994)) (emphasis added)).

- c. 10 U.S.C. 672(d): Under this statute, the Secretary of the Army may order members of a reserve component to active duty (or retain them) with their consent. Although 10 U.S.C. 672(d) may

be used as the authority for the voluntary order to active duty of any reserve, it is also used as the authority to order to voluntary active duty participants in specific Army programs. Such programs include:

- (1) ADSW Under AR 135-200, paragraph 6-1, ADSW tours of active duty are performed under 10 U.S.C. 672(d) and are authorized in connection with projects which specifically support ARNG and USAR programs such as: support of annual screening; operation of training activities, centers and sites; operation of training shops; unit conversions to new weapons systems; study groups; support at training sites and exercises; and short term mission administrative support (purposes which also fall within the categories of duty listed in 10 U.S.C. 678(a)).
- (2) TTAD As stated in AR 135-210, paragraphs 3-3 and 3-11, the TTAD program is designed to provide voluntary active duty, normally performed under 10 U.S.C. 672(d), by ARNGUS and USAR soldiers in support of the Active Army, a Unified or Specified Command, Office of the Joint Chiefs of Staff, or an active force mission of the Office of the Secretary of Defense.
- (3) AGR As provided in AR 135-18, paragraph 1-1, participants in the AGR program serve on active duty under 10 U.S.C. 672(d), or on full-time National Guard duty under 32 U.S.C. 502(f), for the purpose of organizing, administering, recruiting, instructing, or training the ARNG, ARNGUS, or the USAR (see 10 U.S.C. 678(a), as referenced in the purpose descriptions of the RPA and NGPA appropriations).
  - (a) The AGR Program In 1980, Congress established the AGR program by including the following provision within the DoD Authorization Act of 1980: "Within the average strengths prescribed by subsection 9(a) [i.e., programmed strengths of the Selected Reserve], the reserve components of the Armed Forces are authorized as of September 30, 1980, the following number of Reserves to be serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the

reserve components...." (1980 DoD Authorization Act, Pub. L. No. 96-107, section 401(b), 93 Stat. 807 (1979)).

- (b) Implementation of the AGR program within the Army. Authorized AGR duties (i.e., organizing, administering, recruiting, instructing, or training the reserve forces) are set forth in AR 135-18, paragraph 3-1. The underlying authorization for placing individual soldiers on active duty within the AGR program is provided yearly. See, e.g., 1992/1993 DoD Authorization Act, Pub. L. No. 102-190, section 412, 105 Stat. 1351 (1991)). It should be noted that the Army uses the term "AGR" to refer to those tours of active duty described in paragraph 3c(1) which exceed 180 days (see Consolidated Glossary, Reserve Components Personnel Update 23, 1 June 1990). Despite this regulatory limitation, I believe that both the Army's ADSW and AGR programs properly fall within the broad statutory language of 10 U.S.C. 678(a) for purposes of determining the proper source of funding for such tours.
- d. 10 U.S.C. 678: 10 U.S.C. 678(a) pertains only to reserves ordered to active duty under 10 U.S.C. 672(d) in connection with organizing, administering, recruiting, instructing, or training the reserve components. Consequently, the descriptions of the RPA/NGPA appropriations contained in the 1993 DoD Authorization Act, which discuss active duty performed under 10 U.S.C. 672(d), in connection with the duties specified in 10 U.S.C. 678, merely require that the RPA or NGPA appropriations be used to fund voluntary active duty performed under 10 U.S.C. 672(d) when such duty is performed in connection with the AGR or ADSW programs.
- e. Funding of TTAD Title I of the DoD Appropriation Act, 1993, provides that the Military Personnel, Army (MPA) appropriation is available for "pay, allowances, individual clothing...permanent change of station travel...and expenses of temporary duty travel...for members of the Army on active duty (except members of reserve components provided for elsewhere)" (emphasis added). We are advised by OSD OGC that if the RPA/NGPA appropriations are interpreted to provide for pay, allowances,



clothing, subsistence, travel and related expenses  
for Army reserves on active duty under 10 U.S.C.  
672(d) only if they are performing functions  
specified in 10 U.S.C. 678, it follows that the MPA  
appropriation is available to cover these expenses  
for Army Reserves on active duty for the purpose of  
supporting the Active Army, a Unified or Specified  
Command, Office of the Joint Chiefs of Staff, or an  
active force mission of OSD. DoD plans to propose  
legislation remedying the current absence of  
affirmative authorization to fund TTAD- type programs  
with active component appropriations.

f. Conclusion:   ADSW = RPA/NGPA  
                      TTAD = MPA & OMA

### **III. LEGAL REPRESENTATION LETTERS**

The following is guidance for the preparation and submission of management and legal representation letters to audit agencies performing audits of DoD Component financial statements required by the Chief Financial Officers Act of 1990.

Legal representation letters are the auditors' primary means of corroboration of the information furnished by management concerning litigation, claims, and assessments. Legal representation letters are intended to clearly inform the auditors of all lawsuits, as well as asserted and unasserted claims which may be significant in relation to the financial statements, along with an assessment of the probable outcomes--including any potential losses. The DoD leadership supports a materiality level of \$100 million for legal representation letters for financial statements.

#### **Pending or Threatened Litigation, Claims, and Assessments**

- the nature of the litigation, claims, or assessments;
- the progress to date;
- the Department's response or planned response (for example, to contest or seek an out-of-court settlement);
- an evaluation of the probability of a favorable or unfavorable outcome;
- an estimate of the amount or range of potential loss; and
- the names of any outside legal counsel representing the Department in the matter.

#### **Unasserted Claims and Assessments**

- a description of the nature of the matter;
- a statement of the probability that a claim will be asserted;
- our planned response if the claim is asserted;
- an estimate of the possible exposure or range of potential loss; and
- the names of any outside legal counsel representing our organization in the matter.

The following is derived from guidance issued by the General Counsel of the Department of Defense on August 2, 1993, for the preparation of legal representation letters.

- A. A case, XYZ Corp. v. the United States of America, et al., Civil Action No. \_\_\_\_\_, has been filed in the Eastern District Court of New York. The plaintiff is claiming [ insert nature of the case, i.e., damages for/contract claim based on, etc. ].
- B. The amount being claimed is [ insert dollar amount ].
- C. The case is currently in the [ give status of case, i.e., discovery, trial, settlement ] stage.
- D. The Government plans to vigorously contest this case.
- E. We are unable to express an opinion concerning the likely outcome of the case [ covers both the possibility of winning or losing the case and the amount of recovery, if any. ]
- F. Mr./Ms [ insert name(s) of attorney(s) ], Department of Justice, \_\_\_\_\_ Section/Division, [ location of office ] is representing the Government in this case.

#### IV. ANTIDEFICIENCY ACT

1. Armed Services Committees emphasize  
ADA violations occurring within DoD.
2. DoD Comptroller emphasizes immediate  
reporting and expeditious resolution within  
regulatory guidelines.
3. Lawyers must assist Resource Managers.
4. Lawyers must assist Investigating Officers.
5. New Policies
6. CHARLIE
7. BUSTER

## V. REFERENCES

### Fiscal Law: Commonly Used Reference Materials

U.S. Constitution, art. I, § 9, cl. 7  
Title 10, United States Code (Armed Forces)  
Title 31, United States Code (Money and Finance)  
Title 37, United States Code (Pay and Allowances)  
National Defense Authorization Acts  
Department of Defense Appropriations Acts  
Military Construction Appropriation Acts  
Treasury, Postal Service and General Government  
Appropriations Acts  
House Armed Services Committee (HASC), Senate Armed  
Services Committee (SAC), House Appropriations  
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1988)  
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Comptroller General of the United States, Standards for  
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DoD Directive 7045.14, The Planning, Programming, and  
Budgeting System (PPBS) (May 22, 1984)  
DoD Instruction 7045.7, Implementation of the Planning,  
Programming, and Budgeting System (PPBS) (May 23,  
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DoD 7710-1-M, Budget Guidance Manual (May 1990)  
DoD 7220.9-M, Accounting Manual (October 1983)

DoD Directive 7200.1, Administrative Control of  
Appropriations (May 1984)  
DoD Directive 7250.5, Reprogramming of Appropriated  
Funds (Jan. 9, 1980)  
DoD Instruction 7250.10, Implementation of  
Reprogramming of Appropriated Funds (Jan. 10, 1980)  
DoD Directive 7250.13, Official Representation Funds  
(Mar. 12, 1990)  
Army Reg. 37-100-93, The Army Management Structure  
(AMS)  
Army Reg. 37-1, Army Accounting and Fund Control (30  
April 1991)  
Finance Update, Issue No. 13 (31 July 1990)  
Army Reg. 37-47, Contingency Funds of the Secretary of  
the Army (15 January 1990)  
Army Reg. 37-103, Disbursing Operations for Finance  
and Accounting Offices (4 December 1987)  
The Judge Advocate General's School, U.S. Army, Fiscal  
Law Course Deskbook (November 1994)

